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NO. 80-1908

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

MADALYN MURRAY O'HAIR
and
JON G. MURRAY,
Petitioners,

v.

WILLIAM CLEMENTS, et al,
Respondents,

On Petition For Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

PAUL R. GAVIA
Assistant Attorney General
Chief, State and County Affairs

ANN CLARKE SNELL
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Respondents

QUESTIONS PRESENTED

I. Whether Petitioners have standing.

II. Whether the State's permitting private parties to display a small creche and a menorah in the Capitol rotunda in observance of the holiday season violates the Establishment Clause of the First Amendment to the Constitution.

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v.

WILLIAM CLEMENTS, Governor of Texas; MARK WHITE, Attorney General of Texas; and HOMER A. FORESTER, Director of Texas State Board of Control;

Respondents,

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To The United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COME William Clements, Governor of the State of Texas; Mark White, Attorney General of the State of Texas; and Homer A. Foerster, Director of Texas State Board of Control (currently State Purchasing and General Services Commission); and in response to the Petition for Writ of Certiorari submit this Brief in Opposition.

JURISDICTION

Petitioners incorrectly invoke jurisdiction pursuant to the Rules of the Supreme Court of the United States, including Rule 17 (a); the courts below decided the issues in accord with precedent. Further, Respondents assert that Petitioners have no standing to bring their claims under the Establishment Clause.

The judgment of the Court of Appeals (Petition for Writ A. 15a) was signed on February 2, 1981; a petition for writ of certiorari was subsequently filed by Petitioners. In their complaint filed in the federal district court on December 13, 1977, Petitioners alleged jurisdiction pursuant to the First and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. §§1983, 1985, and 1986; and 28 U.S.C. §1343.

CONSTITUTIONAL PROVISIONS

Petitioners attempted to prove their claims below based on the Establishment Clause of the First Amendment to the United States Constitution. Respondents assert that Petitioners have no standing and, therefore, the requirements of Article III §2 of the United States Constitution have not been met.

STATEMENT OF THE CASE

Petitioners filed their complaint in district court on December 13, 1977. Alleging that the display of a creche in the Capitol rotunda established a religion under color of the state law and thereby violated their constitutional rights, Petitioners sought declaratory and injunctive relief, punitive damages, and attorney fees. Through the pretrial order of May 8, 1979, (Petition A.7a-11a), Petitioners deleted their monetary claim

and added allegations concerning the display of the menorah and use of the Capitol rotunda for purposes related to Hanukkah.

On December 22, 1977, the district court denied Petitioners preliminary relief (Petition A pp. 1a-6a) and the Fifth Circuit denied mandamus.

After the parties filed their pretrial order which included stipulations mutually agreed to, the district court made its final decision on cross-motions for summary judgment (Petition A. 12a-14a). The district court considered the stipulations and claims in the parties' pretrial order, adopted the court's December 22, 1977, order, and granted Respondents' motion for summary judgment.

The district court's opinion was affirmed by the Fifth Circuit on February 2, 1981 (Petition A. 15a) and Petitioners petitioned for writ of certiorari in this Court.

OPINIONS BELOW

The opinions of the District Court for the Western District of Texas, Austin Division, are not reported and are reproduced in the Appendix to the Petition for Writ of Certiorari, pages 1a-6a, 12a-14a. The opinion of the Court of Appeals for the Fifth Circuit is reported at 638 F.2d 1231 (5th Cir. 1981) and is reproduced in the Appendix to the Petition for Writ of Certiorari, page 15a.

SUMMARY OF THE ARGUMENT

Because Petitioners have shown no more than generalized ideological interests, they have no standing and this Court is without jurisdiction to decide their claims on the merits. However, if standing is found,

Respondents properly permitted the inclusion of a small creche as a decoration under the Christmas tree and the display of a menorah as holiday observances which had a secular purpose and primary effect neither advancing nor inhibiting religion and which presented no danger of entangling the government with any religion.

ARGUMENT

I. WHETHER PETITIONERS HAVE STANDING

A party asserting standing must show "injury in fact." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-74 (1952). This Court has not found it sufficient merely to assert one's vital interest as a citizen in the establishment issue, *Flast v. Cohen*, 392 U.S. 83, 115-116 (1968) (Fortas, J., concurring), although some courts of appeal have found similar allegations confer standing. *Americans United for Separation of Church and State, Inc., v. United States Department of Health, Education, and Welfare*, 619 F.2d 252, 254 (3rd Cir. 1980) but *see* (Weis, J., dissenting); *Allen v. Hickel*, 424 F.2d 944, 946-947 (D.C. Cir. 1970); *see* also Appendix A 6a, Petition for Writ of Certiorari herein.

Petitioners have alleged no more than an interest shared by all other citizens in the rule of law. A generalized interest enforceable by any citizen has no boundaries and, thus, brings into question the limits of the jurisdiction of federal courts under Article III of the United States Constitution. U.S. CONST. ART. III, §2; *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 226-227 (1973). Since Petitioners have neither alleged nor shown that they were directly affected by the action which they challenge, this Court is without jurisdiction to decide their claim on the merits.

II.

WHETHER THE STATE'S PERMITTING PRIVATE PARTIES TO DISPLAY A SMALL CRECHE AND A MENORAH IN THE CAPITOL ROTUNDA IN OBSERVANCE OF THE HOLIDAY SEASON VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. PURPOSE

The Establishment Clause does not proscribe governmental display of objects which have religious significance. *Allen v. Hickel,* 424 F.2d at 948. In order to conform to constitutional requirements, governments' actions must not have a primary effect which either advances or inhibits religion. To aid in exercising appropriate discretion in matters involving religion, this Court has provided guidelines for use in deciding whether governmental actions are neutral. Governmental conduct meets constitutional standards if the purpose of the action is secular; its primary effect neither advances nor inhibits religion; and it does not foster excessive entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 (1971).

In determining the purpose of any action, the context must be considered. *Florey v. Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980); *Allen v. Hickel,* 424 F.2d at 948-949; *Citizens Concerned for Separation of Church and State v. City and County of Denver,* 508 F.Supp. 823, 827 (D. Colo. 1981). In the instant case, the display,of which the small creche complained of here was a part, included a huge Christmas tree hung with ornaments, brightly wrapped boxes, and garlands.

Characterization, in isolation, of a symbol as religious does not resolve the question of whether its display on government property violates the First Amendment.

Religious symbols are frequently used for secular purposes. They are worn as jewelry, incorporated into various designs, and appreciated for their esthetic qualities without regard to their religious significance. Since persons often bring their own meanings to symbols or interpret symbols in light of the context in which they are experienced, it cannot be assumed that every display of a religious symbol is for a religious purpose or has a religious effect. *Citizens Concerned,* 508 F.Supp. at 829.

Thus, even though the nativity scene is a religious symbol, it may be experienced by viewers as having a variety of meanings. For example, the viewer may perceive a statement about the value of family life, of humility, of poverty, or may see simply a depiction of the simple joy parents take in a newborn child. Undoubtedly, the creche may also be seen as a holiday decoration. In fact, it appears in store window displays, on postage stamps, as tree ornaments, on holiday greeting cards, and has become a familiar part of the folklore of our culture. *Citizens Concerned,*508 F. Supp. at 828.

Petitioners produced no evidence that the nativity scene was anything other than a decoration. The trial court properly concluded, therefore, that its display had a clear secular purpose.

B. EFFECT

What is proscribed by the Establishment Clause is governmental action with a primary or substantial religious effect. *Lemon,* 403 U.S. at 612-613; *Allen v. Hickel,* 424 F.2d at 949; *Citizens Concerned,* 508 F.Supp. at 827. When a government either aids an institution the functions of which are pervaded with a religious mission or benefits a "specifically religious activity" in a "substantially secular setting," the govern-

ment's action has a primary effect of advancing religion. *Hunt v. McNair,* 413 U.S. 734, 743 (1973).

Petitioners' allegations and proof as to effect are wholly speculative. No showing was made that any governmental aid was conferred upon any entity. Certainly, it was not shown that any religious institution benefited by the complained of governmental activity. Even if it is assumed that some benefit did accrue, only those benefits which have a direct and immediate effect of advancing religion are constitutionally infirm. *Committee for Public Education and Religious Liberty v. Nyquist,* 431 U.S. 756, 784 (1973). Effects which are remotely or incidentally beneficial do not violate the Establishment Clause. *Nyquist,* 431 U.S. at 784.

C. ENTANGLEMENT

Discussion of entanglement problems has occured in cases involving governmental aid to sectarian institutions, rather than in fact situations similar to those presented in this case. Applying the following four factors in the entanglement test to these facts illustrates how far afield this case is from a genuine claim under the Establishment Clause: (1) nature of the institutions benefited, (2) type of government aid provided, (3) resulting relationship between the government and the benefited institutions, and (4) likelihood that the governmental action will create political divisiveness. *Lemon,* 403 U.S. at 615, 622-623.

Here, it is not known which religious institutions purportedly benefited; Petitioners have named none. Nor can it be determined what kind of aid was allegedly provided; apparently Petitioners believe that the display is a benefit *per se.* Similarly, no relationship between the state government and any religious institution resulted from the holiday display. Finally, no religious groups participate in the decorating of the rotunda, and there is

an absolute absense of any showing that the modest display has engendered or is likely to engender any political divisiveness. In fact, Respondents assert that excessive entanglement could result if the government were to attempt to expunge all displays of symbols with religious significance from every activity on government property.

The menorah apparently was displayed for the same purpose set out above. It was merely a depiction of another manner in which the holiday season is celebrated by those whose heritage includes a Jewish background. Petitioners made no showing of any religious purpose, effect, or entanglement flowing from the display of the menorah. Therefore, it must be concluded that permitting the display of the menorah was appropriately neutral government conduct. *See Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952).

CONCLUSION

The Petitioners are not seeking governmental neutrality. They are asking for affirmative action which would require removing any allusion to religion from every building owned by the government and from every function performed by the government.If the activity complained of herein were found to contravene the First Amendment, a prohibition would result rather than the exercise of commonsensical, enlighted, and reflective governmental discretion.The Constitution of the United States does not now, and should not hereafter, require the ban or expungement contemplated by the Petitioners.

For the reasons set out above, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

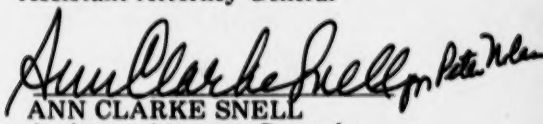
MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

PAUL R. GAVIA
Chief, State and County Affairs

PETER ANDREW NOLAN
Assistant Attorney General



ANN CLARKE SNELL
Assistant Attorney General
Bar No. 18788500
P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Respondents

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Respondents' Brief in Opposition have on this the 7th day of August, 1981, been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

Madalyn Murray O'Hair
Jon G. Murray
The American Atheist Center
2210 Hancock Drive
Austin, Texas 78756.